and 'Spheres of Influence,' not to speak of a multitude of special arrangements with foreign Powers regarding commercial and industrial rights, railways and mines, loans and currency — when this is the situation we have a condition of affairs which provides a superabundance of material for discussions by the students of international jurisprudence."

Dr. Tyau's later volume, as its title indicates, deals primarily with the constitutional situation in China. It is by no means as important a contribution to political science as is his earlier work. In the main it is devoted to an analysis of the draft of a permanent constitution which the Chinese parliament discussed in 1916 and 1917, but upon which it did not come to a final agreement before it was for the second time dissolved by imperial mandate. And, it may be remarked, this instrument still remains unfinished, and China continues to be governed, avowedly at least, under the "Provisional Constitution" hurriedly drawn up in the early days of 1912. The portion of the volume dealing with international questions furnishes additional discussion of points covered in the earlier volume. The problems of treaty revision are specifically considered, and some attention is given to ameliorations of the international restrictions upon China's freedom of action, which Dr. Tyau hoped might be secured at the Paris Peace Conference — hopes that were doomed to disappointment. One statement may with confidence be made. If a League of Nations is established and takes its duties seriously it will find in China alone an abundance of material upon which to busy itself.

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THE LABOR LAW OF MARYLAND. By Malcolm H. Lauchheimer. Johns Hopkins University Studies in History and Political Science. Series XXXVII, No. 2. Baltimore: Johns Hopkins Press. pp. 163.

Mr. Lauchheimer's dissertation is a most timely and disinterested study in troubled waters. He has set out comprehensively and without the coloring of partisanship the labor law of a typical American State — typical, as he says, in the sense that it is neither among the most progressive nor the most backward. It is the law which governs the employment of the vast majority of American workers. It may, then, be reasonably supposed to set forth those principles of social justice for which we have heard our democracy eulogized in recent conferences, and to the support of which our voters have been earnestly summoned under the banner of "Americanism." The duty to examine it carefully is obvious.

Mr. Lauchheimer introduces his subject with a short review of the criminal statutes, from Edward III to Victoria, which sought to suppress or limit the workers' use of collective action. I think that he attaches too much importance to the fact of their repeal and the subsequent statutory legitimations of unionism. A legal attitude of five hundred years of fear and distrust of combination by labor is not eradicated by simple words of repeal. The repeal only changed the mode of its expression from formal criminal prosecutions to the use of the doctrine of implied malice in civil actions, and the consequent injunction and contempt proceedings. But from another point of view these statutes are important. They were the product of conditions and theories of the function of the state which the war has reproduced. The struggle to create governmental authority after the Wars of the Roses made all combinations within the state as jealously regarded as they were with us during the recent war, while our "mobilization of industry," like the Tudor experiment in state-directed production and trade, made combinations of labor seem peculiarly like preparations for rebellion. The Tudors, not being troubled with notions of *laissez*

faire or democracy, directed the force of the government at the act of combination; we leave that to private enterprise, and employ the police power only when the combination begins to function. But the importance of the legal attitude toward combination can only be appreciated and its continuance understood by turning to the civil rights and liabilities of the employer-employee relation. Mr. Lauchheimer sets these out clearly and concisely — perhaps too concisely, or at least too descriptively. For if one is of an inquiring turn of mind, the question must arise, How in the world did a people with senses of justice and humor come to make this arrangement law?

The explanation is in the two outstanding features of the nineteenth century, — the industrial revolution, and the gospel of individualism and the freedom of the will.[1] The vast material development due to the first of these made the all-absorbing legal conception of the century that of the property right. Everything was thought of in terms of property, — reputation, privacy, domestic relations,[2] and as new interests called for protection their success depended upon their ability to take on the protective coloring of property. The application of this theory to the claims of the worker was simple. His labor was property; the power to contract was property.[3] But as it was in his labor and not his job that he had this valuable right, the immediate practicality of the theory was not apparent. It was only when he transformed his properties into a job that they had any value for him, but the right did not follow the transformation and he might have this new property taken away from him "for any reason or no reason." The law protected only the seeded ground; as soon as the crop had ripened, trespassing was encouraged in the name of freedom of trade. But it might be expected that even though the law did not make the job secure it would at least have made it safe. It might; but that would be to forget the great doctrine of free individual self-assertion. The law wanted the individual to be free to act as he chose; it was not going to cramp him with restrictions. If he was a bold spirit and wanted to work in dangerous surroundings, he should be permitted his thrill; and the fact that he knew of the danger was enough to raise the presumption that it was the breath of his nostrils. Likewise if his whim led him to work for starvation wages, or put his children in the factories, or to accept a method of payment which reduced him to a state of peonage, or to tolerate apparently innocuous but in reality grossly careless fellows in "his" shop, he might be incomprehensible but he must be kept free.[4] And just as the employer respected his freedom, so he must respect the employer's freedom. The employer's desire to carry on business was also property which the law protected. The worker must not injure this property nor attempt to interfere with its owner's freedom in utilizing it as he chose.[5]

With the common law in this condition, the worker turned to trade unionism to escape what Lord Morley has called the "curse of industrialism," — insecurity. He gave up his whimsical freedom for the more substantial results of collective bargaining in wages and hours, while the sick and out-of-work bene-

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[1] See Roscoe Pound, "The End of Law as Developed in Juristic Thought," 30 HARV. L. REV. 201.

[2] See, for instance, BOWEN'S CODE OF ACTIONABLE DEFAMATION, 275–278; also, Pollard *v.* Photographic Co., 40 Ch. Div. 345; Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193; see also the cases on expulsions from social clubs, collected in Roscoe Pound, "Equitable Relief against Defamation," 29 HARV. L. REV. (640, 677–682).

[3] For instance, Memo by Sir William Erle, appended to the REPORT OF THE ROYAL COMM. ON TRADE UNIONS IN 1869, p. lxxix. Frorer *v.* People, 141 Ill. 171, 181.

[4] In this country the idea "ran behind all governments and all laws." See also Lochner *v.* New York, 198 U. S. 45; Coppage *v.* Kansas, 236 U. S. 1.

[5] See Regina *v.* Rowlands, 2 Den. 364; Regina *v.* Bunn, 12 Cox, 316; Regina *v.* Druitt, 10 Cox, 601; ERLE, LAW RELATING TO TRADE UNIONS, 74.

fits put a slight margin between him and the brink of absolute destitution. And, more intangible but no less important, he got a feeling of equality and self-respect which the free citizen who had touched his cap and taken what another free citizen chose to give him had never felt. But his only weapon was the strike, and this was certain to conflict with the doctrine of free individual self-assertion. Mr. Lauchheimer gives us the history of the conflict with complete lack of bias. It was a conflict of irreconcilable freedoms — the employer's freedom to carry on work and the employee's freedom to stop. The way out was found through the legal doctrine of constructive malice. A person might exercise his freedom for "lawful" ends even though it entailed injury to another, as in competition. He could not be permitted to do so, however, out of pure maliciousness. This is the doctrine of actual malice, and nothing could be clearer. From this it was only a short step to the conclusion that if the object of the action was not "lawful" it must be malicious — malice would be conclusively presumed from "unjustifiableness" — and the worker is back to his "rights" at common law.[6] The refusal to see anything but individual property rights involved, the refusal, even after the legality of the union was admitted, to recognize and extend some sort of protection to the claims for which it stood, made the limits of the lawfulness which could justify a strike extremely narrow.[7] Lord Lindley summed it up, "You cannot make a strike effective without doing more than is lawful."[8] And more modern officers of the law would strike out the word "effective."

Of course, the resort to private war to secure one's interests is a primitive and wasteful process; but the mere suppression of it by force does not necessarily indicate a more civilized attitude. The real injustice and tyranny of the injunction lies in the fact that under the guise of law it forces the adjudication of the most far-reaching issues of the day by turning to a side issue where the interests of only one party are recognized, — the issue of property. If the common law, like the law administered by the War Labor Board, recognized the right to the recognition of the union, the right of the union to live and grow,[9] the right to certain standards of living, to certain hours, to the test of reasonableness in factory rules and management, to a certain security in one's job, and if the law would enjoin employers who violated these rights, — then the injunction might in reality protect the interests of the consumer instead of acting to give a vested right to one class in its power over another.[10]

Mr. Lauchheimer's own reaction to the situation appears in the last chapter, The State in Relation to Labor. He sees the tendency of social pressure, law, and legislation to move in the direction of group contacts in industry, and feels that the law cannot stop short of forcing dealings between strong unions and strong employers' associations. Such things as workmen's compensation acts, minimum wage laws, factory acts, he sees as establishing a minimum for the protection of the conscientious employer or as simply using the power of the state to bargain for those workers who are not yet strong enough to protect themselves. But the movement is not to be toward paternalism or state capitalism, but toward a system of group *laissez faire*. We are to have strong, self-

[6] Compare Allen *v.* Flood, 1898 A. C. 1, and Quinn *v.* Leathem, [1901] A. C. 495. Malice according to the findings of the jury existed in both cases, but the House of Lords held that motive was immaterial in the first case, where only individual action was considered, while it made the act unlawful when done by a combination in the second case. It is the influence of the old criminal statutes and centuries of distrust of collective action.

[7] See a note in 31 HARV. L. REV. 482, collecting cases.

[8] Lyons *v.* Wilkins, [1896] 1 Ch. 811, 820.

[9] See Boyer *v.* Western Union, 124 Fed. 246.

[10] See Hitchman Coal & Coke Co. *v.* Mitchell, 245 U. S. 229, discussed in 31 HARV. L. REV. 648.

reliant groups which shall represent the various elements in production and shall compete with one another; and the state is to "step in" to see that they do not combine to exploit the consumer or carry their disputes to a costly extent. Perhaps it is idle to quarrel with supposed results in the theoretical end of doctrine; but as Mr. Lauchheimer drew his picture I was not impressed with force of the state's "stepping in." The state seemed to be in already, and between these burly groups to give very much the impression, mental attitude and all, of the Doormouse between the Mad Hatter and the March Hare. It must be a more active partner and play a more intelligent part, or it, too, will be dipped in the tea.

DEAN G. ACHESON.

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THE RELATION OF THE EXECUTIVE POWER TO LEGISLATION. By Henry Campbell Black. Princeton: Princeton University Press. 1919. pp. vii, 191.

After a cursory review of the formal law and actual practice of the governments of the world in respect to the relation of the executive power to legislation, Mr. Black proposes that the President of the United States present his recommendations to Congress by means of completely drafted bills which shall be received and considered in each house by a "Committee on Presidential Bills," with power to move a reference of any bill to "one of the standing committees to which it appropriately belongs," and to act as "guardian of the bill (save for its discussion in the standing committee) until its final passage or defeat." The adoption of this proposal, he says, "would put us back upon a basis of honesty," and "enable us to play the game openly and aboveboard, with candor and self-respect, without disguise or circumlocution, like men who love the splendor of noon and shun the miasmatic mists of twilight."

The author's recital of prevailing law and custom will be welcomed by those who lack access to the secondary works on which it is largely based. It is an undoubted convenience to have familiar knowledge on a special subject winnowed from more comprehensive works on government and set forth in a separate volume. Mr. Black's appreciation of the researches and judgments of his forerunners is acknowledged by frequent and often extended quotations from the works of Bryce, Lowell, Beard, Ford, Freund, Holcombe, Taft, Wilson, and others. The descriptive portions of the volume are unusually free from any intrusions of personal bias. Even in expounding his constructive proposal of legislative committees on presidential bills, Mr. Black does not charge our recent presidents with usurpation. He does, it is true, imply that in their participation in law-making they have not been "content to play the part for which the Constitution has cast them" and that they might have shown "more self-restraint and greater respect for the fundamental principles of constitutional government." But, on the other hand, he points out that his proposal requires no constitutional change, since "it will not be a question of bringing within the Constitution something which it does not now permit," but "merely acknowledging the existence of something which it does not forbid."

Mr. Black's formalism revolts at what he calls our "secret and subterranean and underhand and unacknowledged methods" — methods which, as he points out earlier, "are familiar to every one who reads the newspapers." He yearns to legitimatize custom by adoption in enacted law. He plainly feels that Topsy's genetic process should not be imitated by institutions of government. Unfortunately for him, history is against him. Topsy's biological contribution would have been more accurate had it been applied to government rather than to herself. We should be kept quite busy if we insisted on making our formal law keep pace with our practice. First and foremost we should pass